United States Court of Appeals

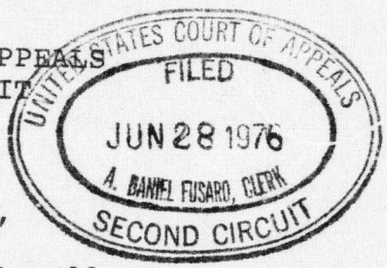
for the Second Circuit

BRIEF FOR APPELLEE

76-7124

To be argued by
Andrew S. O'Connor

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



JOSEPH T. SCHETTINO,

Plaintiff-Appellant,

v.

HARNESS TRACKS SECURITY, INC.,

Defendant-Appellee.

On Appeal From the United States District Court For the Southern District of New York

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BRIEF OF DEFENDANT-APPELLEE
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v.

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BRIEF OF DEFENDANT-APPELLEE HARNESS TRACKS SECURITY, INC.

Preliminary Statement

Plaintiff is appealing from a judgment of the United States District Court for the Southern District of New York (Hon. Whitman, Knapp, J.), dated February 4, 1976 dismissing the complaint in this action brought under the Fair Credit Reporting Act, 15 U.S.C. §1681-1681t, (the "Act") and common law principles of negligence and recklessness.

Statement of the Case

Plaintiff-appellant Joseph T. Schettino ("Schettino") is an individual who has participated in harness racing as an owner of horses (5a)[1]. Defendant-appellee Harness Tracks Security, Inc. ("HTS") is a New York corporation organized for the purpose of assisting the States to maintain the integrity of harness racing (41a-46a). To this end, HTS conducts investigations into questionable persons and practices engaged in harness racing and reports its findings to its clients, harness race tracks and state racing commissions charged with the responsibility of keeping harness racing free from corruption and other illegality (3a). One of HTS's reports, dated February 6, 1973, was written in connection with certain activities of plaintiff (8a-15a). The report concerning plaintiff was not supplied to any prospective employer, insurer or credit issuing institution but was sent only to organizations responsible for maintaining the security and integrity of harness racing (35a-36a).

Prior to commencement of this action, plaintiff had brought an action against HTS for libel, slander and defamation based upon the same report which he now claims violates the Act. See Schettino v. Harness Tracks Security, Inc.,

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[1]References in this form are to Appellant's Appendix.

73 Civ. 1913-WK (S.D.N.Y. November 25, 1974). The earlier action was dismissed by Judge Knapp at the close of plaintiff's case on the ground that HTS's conduct was privileged because it had acted in good faith in the discharge of its duties to its clients (4a). Plaintiff did not appeal that judgment and it is now final.

Plaintiff commenced this action by a complaint filed January 21, 1975 claiming that HTS's report on him violated the Act and that it "was compiled in a negligent and reckless manner without regard as to whether the statements and accusations therein contained were accurate or provable" (16a-18a). Plaintiff seeks $750,000 damages.

Defendant moved to dismiss this action on the grounds it was barred by the prior judgment and that the claim was not cognizable under the Act. The district court granted the motion, holding that the earlier finding of HTS's good faith was determinative of so much of the complaint as purported to assert a claim for negligence or recklessness. Judge Knapp also dismissed the claim under the Act on the basis of evidence presented to him in the prior action. Treating defendant's motion as one for summary judgment, the court found that, contrary to plaintiff's allegation, he was not employed in the business of harness racing but acted exclusively as an owner of horses. Since plaintiff could not show that any of defendant's reports were used in connection with his eligibility

for credit, insurance or employment, the report was not a consumer report within the meaning of the Act (5a).

The district court did not reach the questions (1) whether HTS is a "credit reporting agency" as defined in the Act and (2) whether this action is barred by operation of the doctrine of res judicata. However, the court stated that, were it so required, he would hold that HTS is not a credit reporting agency, because the Act was not intended to apply to an organization whose "activities are confined to providing information to governmental agencies or other persons who are themselves prohibited from using the information without providing due process to any person affected thereby" (5a-6a).

Questions Presented[2]

1. Is HTS a credit reporting agency within the meaning of the Act?

2. Was the district court correct in dismissing this action on the ground that the Schettino report was not a consumer report?

3. May Schettino re-litigate his claim that HTS wrongfully issued the February 6, 1973 report when that

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[2]HTS does not accept Schettino's statement of the issues, and, therefore, in accordance with Fed. R. App. P. 28(a), HTS presents these questions, which it urges are the only ones to be resolved by this appeal.

claim has been finally adjudicated against him in a prior action?

Argument

I

HTS is not a consumer reporting agency within the meaning of the Act.

A review of the provisions of the Act reveals that HTS is not a consumer reporting agency as defined therein and Congress never intended the Act to apply to activities such as are conducted by HTS. A "consumer reporting agency" is defined as:

> "...any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling and evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. 1681a(f).
>
> "The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be issued primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under § 1681b of this Title." Id., §1681a(d).

Rather than collecting and furnishing consumer credit information, HTS conducts investigations of harness racing participants and practices for the purpose of preserving the integrity of the sport. As found in the earlier action brought against HTS by Schettino, it is HTS's function to:

> "...report to its clients any and all information--including rumors--about people participating in the [harness] horse racing profession. Such a service is legitimate and necessary for the racing industry in order to assure that there be no appearance of impropriety, as well as, of course, no actual illegality in the sport." Schettino v. Harness Tracks Security, Inc., 73 Civ. 1913-WK (S.D.N.Y. November 25, 1974) p. 3.

It has been held that organizations which, like HTS, perform activities far removed from the commercial world are not consumer reporting agencies. In Porter v. Talbot Perkins Children's Services, 355 F.Supp. 174, 178 (S.D.N.Y. 1973), the court determined that a social service agency was not subject to the Act because it performed a vital service in the public interest which had little or no connection to the commercial world.

Similarly, HTS's activities, designed to protect harness racing and to maintain harness racing patrons' confidence, are essential to the public interest. The several states in which HTS operates derive millions of dollars annually from

pari-mutuel betting at harness tracks. Those revenues would doubtless be drastically reduced if public confidence in harness racing were to be undermined.

Since its operations are not of the type intended to be regulated by the Act, HTS is not a consumer reporting agency and could not have violated the Act by issuing its report on plaintiff.

II

The district court was correct in dismissing this action on the ground that the Schettino report was not a consumer report.

In order to be a consumer report as defined at 15 U.S.C. 1681a(d), supra, a communication must be used or expected to be used or collected for the purpose of serving as a factor in establishing a consumer's eligibility for personal credit or insurance, employment purposes or certain other purposes.[3] The only allegation of the complaint even suggesting the Schettino report might be considered a consumer report is that Schettino has been employed in the harness racing business (16a). However, as found by the court below, Schettino's connection with harness racing is not as an employee but as an owner of horses. Since plaintiff's activities

[3]See Porter v. Talbot Perkins Children's Services, supra.

in harness racing are restricted to those of a businessman-horse owner, HTS's report cannot be considered to have been produced in connection with Schettino's capacity as a consumer. It is clear that reports issued in connection with an individual's non-personal business dealings were not intended by Congress to be subject to the provisions of the Act:

> "The purpose of the fair credit reporting bill is to protect consumers from inaccurate or arbitrary information in a consumer report, which is used as a factor in determining an individual's eligibility for credit, insurance or employment. It does not apply to reports utilized for business, commercial or professional purposes." 116 Cong. Rec. 36572 (1970) (remarks of Representative Sullivan).

The cases decided under the Act have recognized this Congressional intent by refusing to interpret the Act as applying to reports issued on an individual in his business capacity. See, e.g., Wrigley v. Dun & Bradstreet, Inc., 375 F.Supp. 969 (N.D. Ga. 1974); Sizemore v. Bambi Leasing Corp., 360 F.Supp. 252 (N.D. Ga. 1973); Fernandez v. Retail Credit Company, 349 F.Supp. 652 (E.D. La. 1972).

The report at issue herein was issued in connection with Schettino's business capacity as an owner of race horses; it was not intended to be subject to the Act, and cannot give rise to a violation thereof.

III

Schettino may not avoid the effect of the final adjudication in the earlier action by merely shifting his theory of recovery.

The doctrine of res judicata bars subsequent suits between the same parties based on a claim which has been finally adjudicated on the merits. The effect of the doctrine is not limited to issues actually litigated but extends to issues or grounds which could have been raised in the earlier action. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Saylor v. Lindsley, 391 F.2d 965, 968 (2d Cir. 1968). The test of what matters are concluded by the first action is whether the two suits pertain to the same disputed transactions and arise out of the same operative facts. Wolcott v. Hutchins, 245 F.Supp. 578, 581 (S.D.N.Y. 1965), aff'd, 365 F.2d 833 (2d Cir. 1966); see also, Saylor v. Lindsley, supra at 969; Mathews v. New York Racing Association, Inc., 193 F.Supp. 293, 294 (S.D.N.Y. 1961).

The transactions and operative facts involved in Schettino's two lawsuits against HTS are identical. HTS compiled information concerning plaintiff and issued a report containing the information to some of its clients. In each action, plaintiff claimed the one report was false and defamatory. By bringing this action, based on precisely the same operative facts which were at issue in the prior lawsuit, plaintiff is

attempting to re-litigate settled disputes under the guise of shifting his theory of recovery. As the Third Circuit has said in denying a plaintiff's attempt to re-litigate a cause of action after shifting his theory of recovery:

> "The purpose of the principle of res judicata is to end litigation. The theory is that parties should not have to litigate issues which they have already litigated or had a reasonable opportunity to litigate.
>
> * * *
>
> The principle which pervades the modern systems of pleading, especially the federal system, as exemplified by the free permissive joinder of claim, liberal amendment provisions, and compulsory counterclaims, is that the whole controversy between the parties may and often must be brought before the same court in the same action. The instant case presents an excellent example of one of the things these rules were designed to avoid. As pointed out above, the acts complained of and the demand for recovery are the same. The only thing that is different is the theory of recovery." Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, 469-70 (3d Cir. 1950), cert. denied, 341 U.S. 921 (1951). (footnote omitted)

It would be a waste of the time and resources of both the courts and the parties to allow Schettino multiple opportunities to litigate the same claim. The application of res judicata does not result in any unfairness to Schettino since he has already had his day in court.

Conclusion

The decision of the court below should be affirmed.

Dated: New York, New York
June 28, 1976

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AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK.

Andrew S. O'Connor, being duly sworn, says: that I am over the age of eighteen years and am not a party herein, and that on the 28th day of June, 1976, I served a true copy of the AOC within Brief of Defendant-Appellee Harness Tracks Security, Inc.

upon the attorneys hereinafter named at the places hereinafter stated and set opposite their respective names by depositing the same, properly enclosed in a post-paid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department at 399 Park Avenue within the City and State of New York, directed to said attorneys at their respective addresses given below, which were designated by them for that purpose upon the preceding papers in this action, to wit:

Name	Address	Attorney for
Messrs. Sohn & Gross	P.O. Box 85 1 South Madison Avenue Spring Valley, New York 10977	Plaintiff-Appellant

Andrew S. O'Connor

Sworn to before me this
28th day of June, 1976.

MARK ZEICHNER
Notary Public, State of New York
No. 41-4608808
Qualified in Queens County
Cert. filed in New York County
Commission Expires March 30, 1977